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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections
of the Cable Television Consumer
Protection and Competition Act of 1992

Rate Regulation

MM Docket No. 92-266

COMMENTS OF DIRECTV, INC.

In these Comments, DirecTv, Inc. ("DirecTv") responds to that portion of the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 92-544, released December 24, 1992 (the "NPRM"), concerning the identification of cable systems that are "subject to effective competition" within the meaning of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

Section 3 of the 1992 Cable Act (which adopts a new Section 623 of the Communications Act) creates a comprehensive new regulatory scheme for cable television service rates; however, a cable system's rates are not subject to regulation if the Commission finds that such cable system is "subject to effective competition" (Section 628(a)(2)). Under Section 628(l), three definitions of "effective competition" are provided, and satisfaction of any of these would remove a cable system from the rate regulation provisions of the Act. Because DirecTv will be, at least in some circumstances, a multichannel video programming distributor ("MVPD") under the 1992 Cable Act,^{1/} and will offer service to subscribers in areas also served by cable systems,

^{1/} DirecTv has already commented on the proper scope of the definition of MVPD in the Commission's rulemaking in MM Docket No. 92-259, Broadcast Signal Issues (Notice of Proposed Rulemaking), FCC 92-499 (released Nov. 19, 1992). As DirecTv noted in that proceeding, the

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DirecTv provides these Comments concerning one of the three statutory definitions of effective competition -- that which concerns the presence of an unaffiliated multichannel competitor in the cable system's market.^{2/}

The Commission has requested comment on a number of aspects of this definition of effective competition. DirecTv limits its response to two points: the standard for gauging whether households are "offered" video programming (NPRM at ¶8), and what services should qualify as "comparable video programming" under the statute (NPRM at ¶9).

The Commission has proposed that, in determining whether half of the households in a particular franchise area are "offered" video programming by two unaffiliated MVPDs, the test should be whether such programming is "actually available" to such households. NPRM at ¶8. DirecTv agrees. In the case of DBS service, this will mean looking beyond the footprint of the DBS service provider's satellite, which may cover the entire contiguous United States, to such

Commission's rules should reflect a definition of MVPD that can be applied uniformly throughout the 1992 Cable Act and the rules adopted by the Commission thereunder. See Comments of DirecTv, Inc. in MM Docket No. 92-259 (filed Jan. 4, 1993).

^{2/} Specifically, DirecTv is commenting on the definition of effective competition as meaning:

(B) the franchise area is --

(i) served by at least two unaffiliated [MVPDs] each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households in the franchise area.

Section 628(l)(1)(B). DirecTv believes that, in some instances, it will be deemed to be providing "effective competition" to cable systems under this provision of the statute, and therefore has an interest in the Commission's interpretation of the statutory language. DirecTv's affiliate, Hughes Communications Galaxy, Inc., a licensee in the direct broadcast satellite ("DBS") service, submitted comments in the Commission's rulemaking proceeding to determine the meaning of effective competition under the 1984 Cable Act. Reexamination Of the Effective Competition Standard For the Regulation Of Cable Television Basic Service Rates, MM Docket No. 90-4 (Further Notice of Proposed Rule Making), FCC 90-412 (released December 31, 1990).

factors as whether small satellite antenna reception of the service is permitted under local zoning law, and whether the DBS service provider actually markets the service to the households in question. For example, although it may appear that DBS will be "available" to the entire United States when it is introduced, there may be many local communities in which land use ordinances and physical constraints will preclude the use of even the relatively small DBS receiving dishes.^{3/} In urban areas, there may be apartment buildings where the incumbent cable or SMATV system operator refuses access to the inside wiring to a competing MVPD. Similarly, there may be communities in which, because of copyright or other contractual constraints, the DBS service provider cannot offer service at the same time it is introduced in other communities around the country. In franchise areas where such ordinances and constraints exist, DBS would not qualify as an unaffiliated MVPD "offering" service to at least fifty percent of the households even though the footprint of a DBS satellite may cover the local franchise area. In general, therefore, the Commission should consider whether a service actually can be received by households before determining that those households are offered programming by two or more unaffiliated MVPDs.^{4/}

In considering whether the households in a franchise area are offered "comparable video programming" by two or more unaffiliated MVPDs, the Commission has suggested that if a bare minimum number of channels (i.e., two) are offered,^{5/} and the other numerical benchmarks

^{3/} DirecTV anticipates that in some circumstances the Commission may be required to preempt local zoning ordinances restricting the use of satellite earth stations. See Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, 7 FCC Rcd. 2172 (1992).

^{4/} DirecTV also suggests that the Commission adopt the definition of "attributable interest" adopted in the program access rulemaking for purposes of determining if two MVPDs are "affiliated" under Section 623. See Comments of DirecTV in MM Docket No. 92-265 (filed Jan. 25, 1993).

^{5/} The Commission proposes simply that "multiple channels" should suffice -- DirecTV notes that anything more than one is normally considered "multiple." See, e.g., Webster's Ninth New Collegiate Dictionary ("multiple: 1 : consisting of, including, or involving more than one")

under the statute are satisfied, programming is by definition "comparable" and the area should be presumed to be served by multiple MVPDs. See NPRM at ¶19. This approach is improper for two reasons. First, by its terms, the statute plainly calls for a multi-part effective competition test, under which there must be 50% availability by two or more unaffiliated MVPDs (including the cable system and at least one competitor), and 15% penetration by MVPDs other than the largest, and the services offered by the two or more unaffiliated MVPDs are "comparable." To require merely that an MVPD offer two or more channels of video programming in order to be considered competitive to the local cable system would read the word "comparable" out of the statute altogether. This cannot be what Congress intended. Second, it is an underlying premise of the 1992 Cable Act that there are currently insufficient competitors to cable systems, and one of the chief purposes of the 1992 Cable Act is to "promote the availability to the public of a diversity of views and information" and to "rely on the marketplace to the maximum extent feasible to achieve that availability." 1992 Cable Act §§2(a) ("Findings") & 2(b) ("Statement of Policy"). In keeping with this congressional policy, the FCC's rules should be designed to encourage the entry into the video programming market of MVPDs that maximize the diversity of information received by the public. Therefore, the FCC should read the word "comparable" to require, at the very least, that an MVPD offer a variety of services and an approximately similar number of channels before it can be deemed to be offering service that is "comparable" to that offered by a cable system. This would mean that "niche" services which offer just two or three channels, or which provide only movies or sports fare, for example, would not be effective competitors to cable systems offering a mix of news, variety, sports, movies and children's programming over thirty or forty channels.

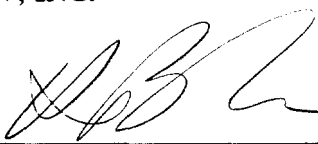
The goals of Congress in enacting the 1992 Cable Act are not to bring cable operators within the yoke of heavy governmental regulation but rather to encourage competitors to cable operators, including competing cable systems and other kinds of MVPDs, to successfully

enter the video programming distribution market. In adopting rules to implement Section 3 of the Act, as in all of the other rulemakings under this statute, the Commission should keep this policy foremost in its mind.

Respectfully submitted,

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